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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

No. 667

LITITZ MUTUAL INSURANCE COMPANY, IMPLEMENT DEALERS MUTUAL FIRE INSURANCE COMPANY, and LITITZ MUTUAL INSURANCE COMPANY and IMPLEMENT DEALERS MUTUAL FIRE INSURANCE COMPANY, Doing Business as the JEFFERSON MUTUALS,
Petitioners,

vs.

MARTHA BARNES,
Respondent.

BRIEF FOR RESPONDENT.

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Demopolis, Alabama,
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Respondent.

BRIEF FOR RESPONDENT.

QUESTIONS PRESENTED FOR REVIEW.

Respondent does wish to state, respectfully, that she is dissatisfied with the presentation by the petitioners of the Questions Presented for Review in this case. Respondent's dissatisfaction arises from the fact that the questions presented for review by petitioners, being five in number, contain, each and every one, the same fault; they assume as true, as a basis for the hypothesis in each case, a fact which is not correct at all. The first question presented assumes as a fact that the insured's limited interest in the property was terminated prior to the institution of the suit. This is not correct at all, and the basic fact being incorrect, this destroys the applicability of the entire first question.

Question Number Two as presented by petitioners assumes as a fact that no monetary loss has been caused the insured and bases the point of the question upon this assumption; actually, it will be seen that the insured has suffered a loss.

Questions Numbered Three, Four and Five all assume as a fact that the Court of Appeals has decided the question contrary to the Law of the State of Alabama, which will also be seen to be incorrect as to fact.

Respondent therefore respectfully points out that petitioners could have presented legitimate questions for review, the questions being as to whether the above-mentioned assumed facts were actually facts or not; since, however, the petitioners have attempted to state the true points of controversy as settled facts and use these controversial points as the bases for artificial questions presented for review, respondent respectfully points out that the petitioners have not properly presented to this Honorable Court a petition for Writ of Certiorari, under the Rules of this Honorable Court.

STATEMENT OF THE CASE.

Respondent wishes to add several very important facts to the statement of the case, none of which were included in the statement of the case made by petitioners.

The respondent in this case has actually paid $4,545.09, in cash money, in the purchase of the rights of Elmer Russell Wood, the insured owner; it will be noted that, in the petition by petitioners, the petitioners stated that the transfer of the mortgage and insurance policy to the respondent by the Co-Trustees of H. A. Feibelman, deceased, was for a "recited consideration of $4,545.09." Respondent points out that, in the agreed stipulation of facts entered into between petitioners and respondent at the time of the trial in the District Court, as shown on page 47 of the record, the full consideration of $4,545.09 had

actually been received from Martha Barnes by the said Co-Trustee. Thus, it will be seen that there was not merely a "recited consideration;" the respondent in this case has actually paid $4,545.09 for the mortgage, and the rights of the insured owner assigned in the insurance policy sued on, in cash, a fact which was stipulated between the parties at the time of the trial.

Demand for payment on the insurance policies from the petitioners has been made by Elmer Russell Wood, W. E. Curb, the Co-Trustees under the will of H. A. Feibelman, and the respondent, and no payment under the policy has been made to any person. These facts were also stipulated between the parties, as shown on page 48 of the record.

The amount due under the note and mortgage which are now held by respondent was, on March 12, 1955, the total sum of $4,545.09, which said fact was stipulated between the parties, as shown on pages 46 and 47 of the record. It will also be noted that this amount is more than $500 in excess of the amount of the damage agreed upon between the parties, namely, $4,000.00, and is several hundred dollars less than the amount of the insurance policy in force, namely, $5,000.00. Premiums on this insurance policy were paid for a full five year term, from October 3, 1949, through the same date of the same month in 1954; that the fire occurred during the fourth year of the five year term of the policy; and no premium has ever been returned by the petitioners to anyone, although more than one year of paid insurance remained at the time of the fire. All these facts are shown on pages 43 and 52 of the record.

Finally, a very important point as to the insurance policy itself should be noted: Unlike the vast majority of fire insurance policies, this particular policy contained absolutely no mention at all of any restriction or provision against transfer of the property by the insured.

ARGUMENT.

In this case, the sole question presented by petitioners for review by this Honorable Court is the question of whether the Court of Appeals has ignored Alabama Law. Since the petitioners have based their argument almost completely upon certain language taken verbatim from one Alabama case, namely, **Aetna Insurance Company v. Baldwin County Building & Loan Association, 163 So. 604**, it seems necessary to examine this one particular Alabama Case with great thoroughness.

In the first place, this particular Alabama case relied on so heavily by petitioners (Aetna Insurance Company v. Baldwin County Building & Loan Association), has a very vital difference from the instant case. In the instant case, as has been so firmly insisted by petitioners from the beginning, the respondent is an appointee under a simple loss payable clause in the insurance policy, having only the right of the insured, Elmer Russell Wood. In the **Aetna** case, supra, the plaintiff was a mortgagee under a New York Standard mortgagee clause. Further, the mortgagee in the **Aetna** case foreclosed the mortgage and purchased the mortgaged property at the foreclosure sale for the full amount of the debt. Now, it is well-settled law both in Alabama and in all other states, that, where a mortgagee purchases the property for the full amount of the mortgage debt, this extinguishes the mortgage debt and also, at the same time, automatically extinguishes the insurable interest of the mortgagee. As stated above, this is not a peculiar Alabama holding; the following quotation from the eminent authority, **Corpus Juris**, shows that this is well settled law: "The foreclosure of the mortgage extinguishes the interest of the mortgagee **as such**, and the same is true when the mortgagee becomes a purchaser at such a sale. But mortgagee so purchasing still has of course an insurable interest as owner." (Emphasis sup-

plied.) **(26 Corpus Juris 31, Sec. 12.)** Thus, it will be seen that the **Aetna** case merely applies a general rule of law in holding that the mortgagee whose only interest was that of a mortgagee and who has purchased the property at foreclosure sale for the full amount of the debt no longer has any insurable interest, as a mortgagee. It is certainly to be assumed that the Court of Appeals was aware of this general rule of law and applied same in this case, or would have applied same, if the facts in this case had shown such law to be applicable.

However, it will be readily seen that the facts of the **Aetna** case, and the law derived therefrom, while perfectly correct in themselves, do not apply to the instant case at all. As stated above, in the instant case the respondent is resting upon the rights of the insured himself, Elmer Russell Wood, under the loss payable clause above mentioned. It is felt that, since petitioners rely completely upon this one Alabama Case, the **Aetna** Case, as their proof that the Court of Appeals erred in failing to apply Alabama Law, it is now necessary to discuss further, and later, Alabama Law. The respondent wishes to point out that this **Aetna** case has been thoroughly discussed in a much later Alabama case, **Milwaukee Mechanics Ins. Co. v. Maples**, 66 So. 2d 159, which completely distinguishes the said **Aetna** case from the instant case. This case, **Milwaukee Mechanics Ins. Co. v. Maples**, was decided by the Court of Appeals of Alabama in 1953; was taken before the Supreme Court of Alabama on June 18, 1953, by Writ of Certiorari, which writ was denied by the Supreme Court of Alabama without any dissenting vote by any of the Justices, and therefore the decision of the **Maples** case is the decision of the Supreme Court of Alabama. In the **Maples** case, the Alabama Court discussed the **Aetna** case as follows:

> "It is the contention of appellant's counsel that to allow appellee to recover the full amount of her loss

after she has received all but $1,000 of the agreed purchase price from the vendee Sears, Roebuck and Company, would in effect allow her to make a profit on the fire, and in effect turn an insurance contract into a wager, a situation contrary to public policy.

Appellant argues that the doctrine of **Aetna Insurance Co. v. Baldwin County Building & Loan Ass'n, 231 Ala. 102, 163 So. 604**, squarely supports this point.

We do not agree. In that case the premiums were paid by the mortgagor, the policy providing, among other things, that the loss was payable to the mortgagee (plaintiff) as her interest may appear. The plaintiff foreclosed the mortgage after the building had burned and purchased the property at the sale for the full amount of the mortgage debt. The mortgagee then sought to recover on the policy. The Supreme Court held that the purchase of the property for the full amount of the debt satisfied the mortgage and the mortgagee was not entitled to recover more.

Under facts of this type the mortgagee's insurable interest is the debt. Such interest diminishes as the debt is paid, and becomes nonexistent when the debt is paid in full.

The policy in the present suit insured Mrs. Maples (appellee) 'to the extent of the actual cash value of the property at the time of the loss * * * against all direct loss by fire'."

The **Maples** case goes on to show that, where the actual insurable interest involved is the interest of the insured owner, and not the interest of a mortgagee under a New York Standard mortgagee clause (thus placing the Maples case on all fours with the instant case) the rule of the **Aetna** case does not apply at all and the transactions between the insured owner, or anyone standing in his stead, and third party, after the loss, and with which transactions the insurance company has no connection and to

which it is not privy, do not affect the rights of the insured owner or those standing under him at all. This is clearly shown from the language of the **Maples** case, as it continues:

> "At the time the policy was written and at the time of the loss, the appellee, as between appellee and appellant, insurance company, was, in law, the owner of the full insurable interest. The appellant's contract was to insure 'to the extent of the actual cash value of the property at the time of the loss'. The fact that the appellee later realized by sale to within $1,000 the amount she has agreed to sell the building for is no defense available to the appellant, who was an entire stranger to the dealings between appellee and the vendee. Appellant's liability must, under the contract, be measured by the fire damage at the time of the loss and not by fortuitous circumstances later befalling the insured and to which appellant was in nowise privy" (Dubin Paper Co. v. Insurance Co. of North America, 361 Pa. 68, 63 A. 2d 85, 8 A. L. R. 2d 1393; Heidisch v. Globe & Republic Ins. Co., 368 Pa. 602, 84 A. 2d 566).

In applying the facts and law of the Alabama case of 1953 (the **Maples** case, supra) it will be seen that the Alabama courts, both Court of Appeals and Supreme Court, definitely hold that the insurance company's liability under the contract must be measured by the fire damage at time of the loss and not by later circumstances arising from transactions between the insured owner and third parties, in which transactions the insurance company is not involved. This rule applies directly to the instant case. In the instant case, as petitioners have so strongly insisted from the beginning, the respondent's rights are measured by those of Elmer Russell Wood, the insured owner. Under the rule of the **Maples** case, the insurance company's liability must, under the contract, be measured by the fire dam-

age at the time of the loss (September 22, 1953); nor can this liability of petitioners be measured by any extraneous circumstances later befalling the insured (or the respondent, claiming under the interest of the insured) to which circumstances the insurance company was not privy. Therefore, it will be readily seen, under the Law of Alabama, it need only be determined what was Elmer Russell Wood's insurable interest, and what was the amount of the damage from the fire, at the time of the loss. This fire damage has been stipulated to be $4,000.00. Under the Alabama Law of the Alabama case, the **Maples** case, the later circumstances arising from the transactions involving the respondent and W. E. Curb, in which transactions the insurance company was not remotely concerned, cannot be considered at all in this case.

Respondent wishes, briefly, to summarize other applicable Alabama law which specifically upholds her right to recover in this case. In the first place, as held by the Court of Appeals in this case, the Alabama case, **Union Ins. Soc. of Canton v. Sudduth, 103 So. 845, at page 847,** says as follows: "A policy of fire insurance, after loss is fixed, becomes a contract for payment of money under this statute, and suit must be brought in the name of the beneficial owner—the person entitled to receive the money in his own right. **Capital City Insurance Co. v. Jones, 128 Ala. 361, 30 So. 674, 86 Am. St. Rep. 152; Norwich Union Fire Ins. Co. v. Prude, 145 Ala. 297, 40 So. 322, 8 Ann. Cas. 121.**" The above-mentioned **Capital City Insurance Co. v. Jones** case, an Alabama case, cites, on page 675 of the record of the case in 30 Southern Reporter, a long list of other cases, both Alabama cases and cases from other parts of the United States, which likewise hold that after the loss became fixed, the policy was nothing other than a contract for payment of money. It might be mentioned also that the above-mentioned 1953 Alabama case, the **Maples** case, again states the Alabama law as follows:

"Further, a policy of fire insurance, after loss is fixed, becomes a contract for the payment of money and suit must be brought in the name of the beneficial owner. **Title 7, Section 127, Code of Alabama 1940; Capital City Ins. Co. v. Jones, 128 Ala. 361, 30 So. 674; Union Ins. Soc. of Canton v. Sudduth, 212 Ala. 649, 103 So. 845.**"

It will be seen that the Alabama Law remains the same as shown by the case quoted by the Court of Appeals (**Union Ins. Soc. of Canton v. Sudduth**, supra).

It is felt that the above citations from the rulings of the Alabama Supreme Court, both old and very new, completely negative the complaint of petitioners to the effect that the Court of Appeals in the instant case decided this issue directly contrary to the decisions of the highest court of the State of Alabama However, since petitioners, in pages 25 through 38 of their petition in this case have set out, verbatim, an extract from their brief which was presented before the Court of Appeals, and which extract raises further points, it seems necessary to consider these additional points raised by petitioners. On pages 34 and 35 of the brief and petition of petitioners, they hold that respondent is trying to have her cake and eat it, too. They state that respondent desires to enjoy the security of the property and also enforce payment from the insurance company of the proceeds of the policy, going back to the above-mentioned **Aetna** case and using it to hold that respondent cannot both have her cake and eat it, too. Respondent respectfully points out that she is **not** trying to do both of these things. She has made the election (as petitioners admit on page 34 of their petition that she has the right to do) of proceeding on the insurance policy. It is obvious that, under Alabama Law, after respondent has collected the amount of the fire damage, namely, $4,000.00 plus interest, respondent will be forced to apply this money upon the mortgage debt and satisfy same. Petitioners have

thoroughly proved this point, and respondent agrees with petitioners on this point, to the effect that (after collection of the insurance money from petitioners) respondent will have to satisfy the mortgage and the mortgage debt of record. Nothing in the record in the instant case and nothing in the brief of respondent in the District Court or in the Court of Appeals or in this argument gives a hint that the respondent wishes to both have her cake and eat it, too; she is quite willing and anxious to satisfy the mortgage and the mortgage debt as soon as petitioners pay the amount due under the insurance policy.

It is respectfully pointed out by respondent that, as stipulated between the parties, respondent paid $4,545.09 in cash money for the rights of the insured mortgagor, Elmer Russell Wood; she certainly has a right under Alabama Law, including the Alabama Law pointed out by petitioners, to collect the amount of the fire damage, being the $4,000.00 plus interest, from petitioners in this case. If the argument of petitioners were believed, it would be held to be an evil thing for any appointee of the insured to sell his rights and for the assignee thereof to try to collect on the insurance policy and regain money paid out in a normal business transaction. The Alabama case relied on by petitioners, the **Aetna** case, shows this to be untrue and that respondent does have the right to purchase the rights of Elmer Wood, the insured owner, and recover on the insurance policy (since she is not a mortgagee who has foreclosed the mortgage for the entire debt).

It is true that respondent, in this case, cannot recover, even as the assignee of the rights of Elmer Russell Wood, unless it is shown that Elmer Russell Wood also could recover. On this point it seems necessary to point out that all of the law available on the subject, both that cited by the petitioners and other law, holds that there are only two times when an insurable interest must exist for an insured to be able to recover. The time of the issuance of the

policy, and also at the time of loss. Reference to page 26 of the petitioners' brief, in the quotation from the eminent authority, **Appleman on Insurance**, will show the following:

> "A contract of fire insurance is a personal contract for indemnity for the insurable interest possessed by the insured at the time of the issuance of the policy, and also at the time of loss. The insured's liability is measured thereby."

Except in such an isolated case as that of the **Aetna** case, wherein the mortgagee is suing on the basis of his position as a mortgagee and has extinguished his interest by securing the amount of the mortgage debt in full, there are only two times when an insurable interest must exist: At the time of the issuance of the policy, and also at the time of loss. Since the respondent in this case is claiming under the rights of the insured himself, these are the only two times when an insurable interest must be shown to have eixsted.

Anotner eminent authority, **Corpus Juris Secundum**, gives the same principle of law, citing several cases, including an Alabama case, as authority therefor;

> "To render the contract valid, insured is required by many authorities to have an interest in the property at the time of making the contract as well as at the time of loss, although there are cases which seem to hold that an insurable interest at the time of the loss is sufficient, and it has been said that the requirement of an insurable interest when the risk is assumed arose merely to prevent the use of insurance for illegitimate purposes, and that it should not be extended beyond the reasons for it by excessively technical construction." **(44 Corpus Juris Secundum 875, Section 179)** (citing, among other cases **Girard Fire and Marine Insurance Company v. Gunn, 130 Southern 180, 221 Alabama 654**).

It should be further pointed out that, under Alabama Law, the insured owner, Elmer Russell Wood, had other rights over and beyond his duty and liability as an endorser of the note and mortgage in this case. In the first place, in addition to Elmer Wood's liability as an endorser, he has two very definite rights, arising from this transaction, which he would not wish to relinquish, and each of which would constitute an insurable interest. As a surety on the mortgage, he had a right to redeem the mortgaged property from any foreclosure. This right is shown from the authority, **59 Corpus Juris Secundum 1597, Section 836**: "As a general rule sureties on the mortgage indebtedness, or a part thereof, may redeem from the mortgage" (citing **Alabama** Case **Oden v. Valentine, 127 Southern 219, 220 Alabama 626**). In this 1930 case, the Supreme Court of Alabama held that Robert Oden, an accommodation endorser on his brother's (mortgagor's) note, was entitled to bring a bill for redemption of his brother's land upon foreclosure of the mortgage by Valentine, the mortgagee; thus, under this Alabama Case, since Wood is a surety on a mortgage indebtedness, a fact which has been admitted and insisted upon by petitioners, he still had an equity of redemption at the time of the fire. This equity of redemption is a valuable right which he would not want to relinquish; certainly, the petitioners cannot relinquish this right for Wood by insisting that he has been released by the alleged release of Curb, his principal. In other words, the petitioners cannot take away from Wood his right under these facts by insisting upon the fact that he could be released; he might not want to be released, and this Alabama Case shows that his right to redeem would be a valuable right which would cause him not to wish to be released from his position as surety.

Malone v. Nelson, 167 Southern 714, 232 Alabama 243, is another Alabama case, holding that a child of the mortgagor could redeem by proper bill, during the lifetime of the mortgagor parent, merely because the child was [illegible]en-

tioned in the Alabama Statute **(Title 7, Section 727, Code of Alabama of 1940)** (Infra), and without having to show any interest in the property at all at the time of foreclosure.

Again, the Alabama case, **Tennessee Valley Bank v. Sewell, 107 Southern 834, 214 Alabama 362 (1926)**, upholds the right of a mortgagor, who has conveyed the property to a grantee who has assumed the mortgage, to **insist** upon the right to pay off the mortgage debt and have an assignment of the mortgage to him so that he may then bring a bill for foreclosure; in this Alabama case the mortgagee not only was not trying to collect from this original mortgagor but, on the contrary, insisted upon marking the mortgage paid. However, the mortgagor (who had conveyed the property away completely after making the mortgage) wanted to pay off the mortgage and foreclose, and the Supreme Court of Alabama specifically upheld his right to do so. In the instant case, Elmer Russell Wood is in exactly the same position; after assuming the mortgage himself, he sold to Curb, who assumed the mortgage; as pointed out hereinabove, there are several reasons why Wood might wish to insist upon the right to pay off the mortgage in the instant case, which is obviously in default and has been for years, and have the mortgage subrogated to him so that he may foreclose on same; petitioners cannot give away Wood's right to this privilege granted to him by Alabama Law by saying that the respondent released Curb and thus released Wood. Wood is the only person who could claim this exemption, if the exemption existed at all; if he preferred, he could pay the mortgage debt, instead, and foreclose the mortgage himself, and thus recoup some of the loss he suffered on this property during the time he owned it. He obviously paid $12,500.00 cash for the property, in addition to assuming the $7,500.00 mortgage debt, and sold it for $100.00 plus the mortgage debt. He would very likely value the opportunity to buy the property in at foreclosure, and petitioners cannot take

this right away from Wood by saying that he might have a right to claim that he was released from his liability under the mortgage.

The Alabama case (**Tennessee Valley Bank v. Sewell,** supra) upholds this right as follows: "When the mortgagor, having become a surety, pays off the mortgage, he is entitled to hold it by equitable assignment or subrogation for the purpose of reimbursement from the grantee." The above mentioned Alabama Statute is very pertinent on this point: **Title 7, Section 727, Code of Alabama of 1940. Redemption by Debtor et al.:** "Where real estate, or any interest therein, is sold under execution, or by virtue of any decree in the circuit court, or under any deed of trust, or power of sale in a mortgage, the same may be redeemed by the debtor, junior mortgagee, vendee of the debtor, or assignee of the equity, or statutory right of redemption, wife, widow, child, heir at law, devisee, or any vendee or assignee of the right of redemption under this Code, from the purchaser, or his vendee, within two years thereafter in the manner provided in this chapter."

Since petitioners have constantly claimed that Elmer Russell Wood's interest in the property at the time of the fire was a very small and nominal thing it seems necessary to go into this point. There is an annotation on the entire subject of the extent of recovery by an insured who has only a partial or limited interest in the insured property in **Volume 68** of the **American Law Reports,** beginning at page **1344.** The general rule, as shown in this annotation, is to the effect that the recovery can only be to the extent of the limited interest of the insured. However, this annotation definitely shows that there are two very vital exceptions to this general rule, one of them being the exact facts of the instant case, and this annotation shows that, under these facts, the limited interest is permitted to recover the full value of the insurance, or the full value of the damage,

whichever is less. To quote from **page 1349**, of **68 American Law Reports**:

> "There is a class of cases which allow full recovery for the value of the property destroyed, regardless of the extent of the insured's interest therein . . .
>
> In the same category may be classed cases involving insurance by mortgagors to the full value of the mortgaged property. In such cases, the question arises whether the mortgagor is entitled to recover only the value of his equity of redemption or his equity of redemption plus the mortgage debt, the conclusion invariably being, unlike the case of a mortgagee, that the measure of his recovery is the full value of the property within the limits of the policy. **Carpenter v. Providence Washington Ins. Co.** (1842), **16 Pet. (U. S.) 495, 10 L. Ed. 1044; Nussbaum v. Northern Ins. Co.** (1889); (C. C.) **1 L. R. A. 704, 37 Fed. 524; Borden v. Hingham Mut. F. Ins. Co.** (1836), **18 Pick. (Mass.) 523, 29 Am. Dec. 614; Strong v. Manufacturers' Ins. Co.** (1830) **10 Pick. (Mass.) 40, 20 Am. Dec. 507; J. ks v. Liverpool & L. & G. Ins. Co.** (1910), **206 Mass. 59., 138 Am. St. Rep. 411, 92 N. E. 998.**"

To quote further from the same authority, **68 A. L. R. 1350**:

> "The reason for the above rule as to the mortgagor is, of course, that the mortgage is merely a security for an obligation existing independently of the mortgage, and that the destruction of the mortgaged property does not relieve the mortgagor of such obligation. Hence the strict indemnity theory of an insurance contract is not infringed by allowing full recovery by the mortgagor; although in one case found, **Royal Insurance Co. v. Stinson** (1881) **103 U. S. 25, 26 L. ed. 473**, it is held that the rule applies even though the mortgagor is not personally liable for the debt. This reason becomes all the stronger where the mortgagor

agrees to insure the property for the benefit of the mortgagee."

It will be seen from an examination of the above quotation, and citations, from the American Law Reports Annotation, that the Court of Appeals in the instant case based its rulings on these same cases; reference to pages 20 and 21 of the petitioners' Petition, wherein the opinion of the Court of Appeals in the instant case is set out, will show that the Court of Appeals in this case came to its conclusion as to the value of the insurable interest of Wood at the time of the fire, based upon these same cases, and other authorities. If there were any Alabama cases opposed to this reason, it might be that petitioners would have a right to complain; however, petitioners have not cited any Alabama cases on this point which are in opposition to this holding of the Court of Appeals. In addition to the authorities on this point cited in the above-mentioned annotation from **68 American Law Reports**, and in addition to the authorities cited by the Court of Appeals, as shown on page 21 of the petitioners' Petition, in which the opinion of the Court of Appeals is set out, the respondent wishes also to cite the following authorities:

Joyce on Insurance, Section 1029;
Waring v. Loder, 53 New York 581;
Buck v. Phoenix Insurance Company, 76 Maine 586;
4 Appleman Insurance Law and Practice, Section 2187, Page 67 (wherein is said: "The majority of courts have recognized the mortgagor's right to redeem as an insurable interest of itself. Nor is such insurable interest lost until the period for redemption has expired. And such insurable interest during the redemption period is **for the full value of the property.** (Emphasis supplied.) (Citing many State cases and one United States case.)

One case seems to be, without doubt, the leading case on the subject of the value of the insurable interest of a mort-

gagor who no longer owns the property insured; this is the early (1830) Massachusetts case of **Strong v. Manufacturers' Ins. Co.**, supra. In this case the owner, Strong, gave two successive mortgages to Stebbins, then insured the building for $1,400; later, three judgment creditors against him had the property sold at auction and the mortgagee took over the premises, renting them back to Strong; thereafter fire damages of $1,300 occurred; several months after the fire the equity of redemption was reconveyed to Strong, who had sued on the fire insurance policy for $1,300; in a very widely-quoted opinion, Wilde, J., held:

> "Upon the facts stated we think there can be no doubt that the plaintiff had an insurable interest in the house assured, at the time the policy was effected; for although a policy of insurance is a contract of indemnity, and wager policies are not to be countenanced, yet a legal title to the property insured is not necessary to give validity to such a contract. A mere equitable title or any qualified property in the thing insured may be legally protected by insurance; **Columbian Ins. Co. v. Laurence, 2 Peters (Sup. Ct. Rep.) 25; Marshall on Ins. (1st Ed.) 91**; and it is very clear that the plaintiff not only had an insurable interest, but that his interest was substantially the same as it would have been had the property insured been free from any incumbrance; for he was liable to the mortgagee and the attaching creditor for the whole amount of the debts for which they had obtained liens, and it is well settled that a mortgagor may protect his equitable interest at any time until actual foreclosure of the mortgage. Nor did any of the events subsequent to the insurance wholly divest the plaintiff of his interest for after the sale of the equity still he had a right to redeem, and this right might constitute a valuable interest. No evidence was offered to show that it was not. The presumption is that it was of some value, for the plaintiff did after-

wards actually redeem or purchase the equity; and independently of any circumstance tending to show that a right of redemption is a valuable interest, the law would presume that it was, the contrary not appearing. The plaintiff, too, might, from local attachment and other circumstances, estimate the property higher than others would, and as the value of property is not to be ascertained by the market price, or by the opinion of witnesses, in a case like this, we think the underwriters have not shown any defense on the ground that the plaintiff had no interest at the time of the loss. The value of the plaintiff's interest in the property insured is not material. If he had an insurable interest at the time the policy was effected, and an interest also at the time of the loss, he is entitled to recover the whole amount of the damage to the property, not exceeding the sum insured."

In an Annotation **(20 American Decisions 507)** it is stated:

> "**Strong v. Manufacturers' Ins. Co.** is most extensively referred to in subsequent decisions upon all the points which it decides."

In conclusion, it would seem pertinent to discuss a statement contained in the Argument of Petitioners on page 13 of their Petition: "The effect of the decision would be to deprive petitioners of a fairly substantial amount of money in a case, which if left in the Court of the State of Alabama, would probably have been decided in the petitioners' favor." Petitioners seem to be complaining because, in their opinion, the courts of the United States have deprived them of rights which would have been granted to them by the courts of the State of Alabama. In their statement of the case, on page 9 thereof, petitioners merely stated that the respondent instituted the present suit in the Circuit Court of Marengo County, Alabama, but did not mention the fact that it was the petitioners who,

themselves, removed the case from the State Court to the Federal Court. By reference to pages 12, 13 and 14, of the record it will be seen that the petitioners, by Notice of Removal and by Removal Bond, filed on September 29, 1955, in the Circuit Court of Marengo County, Alabama, themselves are the ones who removed this case from the State Court and placed it in the Courts of the United States of America. Respondent respectfully points out that petitioners have shown no Alabama Law of any sort which has been ignored or overlooked by the Court of Appeals in the instant case but that, on the contrary, the Court of Appeals has applied law which is both general throughout the United States and is specifically upheld by the cases of the Supreme Court of Alabama and thus, respondent humbly prays that this writ will be denied.

Respectfully submitted,

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Certificate of Service.

I, W. W. Dinning, one of the Counsel for Respondent, in this cause, hereby certify that I have mailed a copy of the foregoing Brief for Respondent to Hon. Hugh A. Locke, Counsel for Petitioners, to his office at Frank Nelson Building, Birmingham, Alabama, and a copy to Messrs. Mead and Fitzpatrick, of Counsel for Petitioners, to their office at Frank Nelson Building, Birmingham, Alabama, each by United States Mail, postage prepaid, this 9th day of January, 1958.

W. W. Dinning,
Demopolis, Alabama,
Of Counsel for Respondent.